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IN THE

Supreme Court of the United States

No. 854, October Term, 1968

RANDOLPH PHILLIPS, NINA PHILLIPS, SAMUEL J. PHILLIPS, PATRICIA N. BERMAN and ELIZABETH BOBRICK in their own right individually and as members of The Committee for Fair Play for Voters,
Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, and JOHN P. LOMENZO, Secretary of State of the State of New York,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF APPELLEES TO DISMISS OR AFFIRM

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Nelson A. Rockefeller, Governor of the State of New York, and John P. Lomenzo, Secretary of State of the State of New York, appellees in the above-entitled matter, move to dismiss the appeal herein on the ground that the appeal presents no substantial federal question and, in the alternative, move to affirm the order appealed from on the ground that the questions raised in the appeal were correctly decided by the Court below and are so unsubstantial as not to need further argument.

Statement

On January 3, 1965, Robert F. Kennedy began serving a full six year term as United States Senator from the State of New York, which term expires on January 3, 1971.

The primary election in 1968 in New York State was set by the Legislature for June 18, 1968. On June 6, 1968, twelve days before that primary election date, Senator Kennedy died and his office thereupon became vacant by operation of law. That vacancy was then required to be filled in accordance with the provision of Amendment XVII to the Constitution of the United States. That Amendment provides in pertinent part:

> "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies. *Provided,* that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

Pursuant to the authority granted by that Amendment, the Legislature of the State of New York enacted what now constitutes Section 296 of the New York Election Law, which provides:

> "At the general election next preceding the expiration of the term of office of a United States senator from this state, a United States senator shall be elected by the people for a full term of six years. If a vacancy occur in the office of United States senator from this state in any even numbered calendar year less than sixty days prior to an annual fall primary* election, or thereafter during said even numbered year, the gover-

* By amendment of N. Y. Election Law, § 191, the fall primaries were abolished effective January 1, 1966 (N. Y. Laws of 1965, ch. 1070) and the primary elections confined solely to one primary to be known as a spring primary and all references to the fall primary were made applicable to the spring primary election.

> nor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. If such vacancy occur in any even numbered calendar year sixty days or more prior to an annual fall primary election, the governor shall make a temporary appointment to fill such vacancy until the first day of December in such even numbered calendar year. If a vacancy occurs in the office of United States senator from this state in any odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. Such an appointment shall be evidenced by a certificate of the governor which shall be filed in the office of the secretary of state. At the time of filing such certificate, the governor shall issue and file in the office of the secretary of state a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration of the term of such appointment."

Pursuant to Section 2966, the only statutory authorization in this State for filling the office of United States Senator, the Governor was thereupon empowered to fill the vacancy by temporary appointment for a period ending December 1, 1970.

On July 16, 1968, a summons was issued in a case entitled *Valenti* v. *Rockefeller and Lomenzo* and the complaint served on the defendants on July 19, 1968. On July 17, 1968 a summons was issued from the United States District Court for the Southern District of New York in this case, a substantially similar case, and served on the defendants on July 22 and 23 respectively. On July 19, 1968, another summons was issued in the Southern District in an action entitled *Backer* v. *Rockefeller*. That summons and complaint were served on defendant on July 23, 1968.

All three actions sought the convening of a three-judge court and a declaratory judgment to the effect that New

York Election Law, § 296 is unconstitutional and void as being in conflict with the provisions of Amendment XVII to the Constitution of the United States. All three actions also sought an order mandating a writ of election directing the vacancy to be filled by election on November 5, 1968.

Defendants' answer in each case denied the allegations of unconstitutionality.

The actions were heard together before a single three-judge court, convened in the Southern District of New York, on August 7, 1968. Subsequent to argument and prior to the decision of the Court, Charles E. Goodell was appointed by Governor Rockefeller to fill the vacancy for a term ending December 1, 1970 and a writ of election was issued for the November 1970 election to fill the vacancy for the remainder of the unexpired term (December 1, 1970 to January 3, 1971).

The three-judge court, in a decision concurred in by two of the judges, held that the provisions of New York Election Law, § 296 did not exceed the permissible limits of discretion conferred upon the states by the Seventeenth Amendment concerning the time and conduct of Senate vacancy elections and dismissed the complaints.*

In holding the statute valid, the basis for the majority decision was stated initially in the opinion (A4):

> "Substantial state interests are furthered by the decisions of the New York Legislature that Senate vacancy elections be held only in conjunction with regular congressional elections, and that candidates for vacancy elections be selected through the state's modified direct primary system.

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* The Court's opinion and the dissent have been printed in full as Appendix A to Appellant's Statement as to Jurisdiction. Page references to those opinions herein will refer to pages of that printed Appendix.

> "Our decision is strongly influenced by the fact that from the ratification of the Seventeenth Amendment in 1913 down to the present day most state legislatures have interpreted its provisions as authorizing the enactment of vacancy election statutes very similar to the New York law attacked here. Accordingly we find that an election in November, 1970 to fill this vacancy will be in compliance with the Amendment."

The majority pointed out that the Seventeenth Amendment authorizes the Governor to make a temporary appointment and that the appointee may hold office "until the people fill the vacanc[y] by election *as the legislature may direct*" (A7). Effect must be given, the opinion stated, to the natural reading of the Amendment as adopted and that such a reading grants to the states some reasonable degree of discretion concerning both the timing of vacancy elections and the procedures to be used in selecting candidates for such elections.

ARGUMENT

The appeal raises so unsubstantial a federal question that no further argument is necessary.

The appellants here contend that the appeal raises substantial questions on the ground that the decision of the Court below delays an election of a Senator for 29 months. Other questions presented earlier in the Jurisdictional Statement are not further shown to be substantial in the Statement. Appellees submit that no substantiality is shown as to the questions raised in this appeal and that those questions are in fact so lacking in substantiality as to warrant no further argument.

Amendment XVII provides upon the occurrence of a vacancy in the office of United States Senator that

(1) the governor shall issue a writ of election to fill the vacancy

(2) the governor is authorized to make a temporary appointment to fill the vacancy until the vacancy is filled by election, and,

(3) the state legislature is empowered to determine the manner of filling the vacancy by election.

A review of the provisions of New York Election Law, § 296 shows that New York's statute obviously and on its face complies with the requirements of Amendment XVII.

First, as to the issuance of a writ of election, Election Law, § 296 requires that the Governor issue a writ of election at the same time the certificate of temporary appointment is filed. The time that appointment is made, the certificate filed and the writ issued are immaterial. It is not the timing of these acts which determines the date of the election to fill the vacancy but rather the date of occurrence of the vacancy itself. Consequently, Election Law, § 296 complies with the requirements of Amendment XVII in this regard since a writ of election must be issued under that section.

Secondly, the appointment made by the Governor is clearly described by Section 296 as a "temporary appointment" and its duration varies, dependent upon the date of happening of the vacancy, from approximately eight months at the least to approximately two years and seven months at the longest. This results from the provision of three separate alternatives as to appointment. The length of the terms are all dependent upon two requirements; one, that a primary election intervene between the occurrence of the vacancy and the election to fill it and that the election itself occur in an even numbered year. Even a cursory analysis of these requirements makes the basis for those provisions obvious. The possibility of the selection of a candidate

in a primary election and the election of the Senator at a general election in either a gubernatorial or presidential year insures the greatest numerical participation of voters in the selection of the Senator.

Thirdly, all of these provisions are legislative enactments as authorized by Amendment XVII. They are clearly a reasonable exercise of the discretion granted to the States by the Amendment, which itself requires no uniformity in such statutes.

The crux of the arguments advanced by appellants is not the fact that Section 296 authorizes the Governor to make a temporary appointment to fill the vacancy but rather the duration of that appointment which by virtue of the date of Senator Kennedy's death, June 6, 1968, less than 60 days prior to the June 18 primary in 1968 will result in the appointee serving until December 1, 1970, a date made more significant by the fact that Senator Kennedy's term expires January 3, 1971. These two most significant factors (the date of occurrence of the vacancy and the date of expiration of the full term), it must be remembered, are not factors which were in any way planned or subject to the control of the Governor or the State of New York. For example, if Senator Kennedy's term had expired on January 3, 1973, instead of 1971, the duration of the temporary appointment would have lost much of its significance.

The only question is whether a term of office running from some time in 1968 to December 1, 1970 constitutes a "temporary" appointment. It is submitted that obviously it does since this period is substantially less than a full six year term. And it is further submitted that New York Election Law, Section 296 is not unreasonable and is clearly constitutional and presents no substantial federal question for decision by this Court.

Furthermore, the appeal is rendered moot by the fact that the plaintiffs in their complaint sought to mandate the filling of the vacancy at the November 5, *1968* election, and that that relief, of course, is now impossible. Consideration by the Court below of other alternative dates of election was outside the original relief sought by appellants.

The other questions raised cursorily in the Jurisdictional Statement, namely, that a 90 day delay in the appointment creates a lapse in the power of appointment and that the delay in the decision violated the judicial obligation of the members of the Court, are equally without merit.

The Statement ignores the fact that for almost 60 days of the period between the creation of the vacancy and the appointment, court actions seeking to enjoin such an appointment were pending. The Governor, of course, delayed the appointment to give the Court time to act and finally made the appointment only when it appeared that the Court's decision would not be in immediately forthcoming and that the interests of the State in the Senate necessitated an appointment. However, in any event, a power to appoint does not lapse by mere failure to exercise that power unless the statute creating the power so provides. To so hold would create a vacuum in the power to fill the vacancy, an intolerable situation.

The reason for the delay by the Court below in decision is apparent from the length of the opinions and the extensive research displayed in the footnotes and the appendices. Justice is not served by hasty decision in a matter such as this which is one of first impression in the Courts of this nation.

CONCLUSION

The appeal herein should be dismissed for lack of a substantial federal question, or in the alternative, the order appealed from should be affirmed, on the ground that the questions raised in the appeal were correctly decided by the Court below and are so unsubstantial as not to need further argument.

Dated: December 27, 1968.

Respectfully submitted,

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